Supreme Court, U.S.
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No. 01-626

In The

# Supreme Court of the United States

MARY JOHNSON, Individually and as Representative of the Estate of Billy D. Johnson, Deceased,

*Petitioner,*

v.

H. GRANT TAYLOR, M.D., LUBBOCK METHODIST HOSPITAL PRACTICE MANAGEMENT SERVICES, INC., d/b/a METHODIST MEDICAL GROUP d/b/a LUBBOCK DIAGNOSTIC CLINIC, and METHODIST HOSPITAL, LUBBOCK, TEXAS d/b/a HODGES CANCER CENTER,

*Respondents.*

**On Petition For A Writ Of Certiorari To The Texas Court Of Appeals, Seventh District**

## RESPONDENT METHODIST HOSPITAL, LUBBOCK, TEXAS, d/b/a HODGES CANCER CENTER'S BRIEF IN OPPOSITION

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## QUESTIONS PRESENTED FOR REVIEW

1. Since this Federal constitutional contention was first raised by Petitioner in Petitioner's Motion for Rehearing in the Texas Supreme Court and the Judgments of the trial court and of the Texas Court of Appeals with respect to Respondent Methodist Hospital are primarily based upon state common-law which adequately, independently and correctly supports the Judgment of the trial court, is any alleged Federal constitutional contention urged by Petitioner before this Court for review?

2. Did the State trial court correctly render a take-nothing judgment in favor of Defendant/Respondent Methodist Hospital on the ground that Methodist Hospital (a hospital which is not licensed to practice medicine) had no duty (or even a right) to discuss with the deceased patient and his family the patient's prognosis and risks, possible benefits, and other considerations involved in patient's proposed treatment, as a matter of law?

3. Did the State trial court correctly render judgment in favor of Defendant/Respondent Methodist Hospital on the additional ground that Plaintiff/Petitioner's claims in this case are governed and barred by the provisions of Vernon's Texas Revised Civil Statutes Annotated, art. 4590i, section 12.01(a) and section 6.02, as a matter of law?

4. Is there any merit to Petitioner's vague and ambiguous contentions as to the unconstitutionality of Vernon's Texas Revised Civil Statutes Annotated, art. 4590i, assuming, *arguendo*, that such contentions are properly before this Court for consideration?

## LIST OF PARTIES

The caption of this case includes the names of all parties.

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## RESPONDENT'S BRIEF IN OPPOSITION

Respondent Methodist Hospital, Lubbock, Texas, d/b/a Hodges Cancer Center, respectfully requests that the Court deny the Petition for a Writ of Certiorari.

This case does not involve any Federal constitutional question which was properly raised and decided by the Texas Supreme Court. The trial court correctly rendered a take-nothing judgment for this Respondent on the basis of its Motion for Summary Judgment, which was correctly affirmed on appeal by the Texas Court of Appeals for the Seventh District of Texas. Petitioner's Petition for Review (which is completely discretionary) was properly denied by the Texas Supreme Court.

## STATEMENT OF THE CASE

This is a suit for common-law fraud and an alleged claim under the Texas Deceptive Trade Practices Act ("DTPA") for alleged misrepresentation and failure to disclose information by Petitioner, Mary Johnson, Individually and as Representative of the Estate of Billy D. Johnson, Deceased (Plaintiff in the trial court). (1 CR 3-6).

The primary defendants in this case are Respondent, H. Grant Taylor, M.D., the treating physician of the deceased patient, and Respondent Methodist Hospital, Lubbock, Texas, d/b/a Hodges Cancer Center, which entity administered the treatment to the deceased patient prescribed by the deceased patient's treating physician, Dr. Taylor.

The parties will be referred to hereinafter primarily by their designation in the trial court.

The trial court rendered a take-nothing judgment based on the Motions for Summary Judgment filed by both Defendants.

It is undisputed and conceded by Petitioner in her brief that Plaintiff did not assert any Federal question or constitutional contention until Plaintiff's Motion for Rehearing in the Texas Supreme Court. On page 6 of the Petition for a Writ of Certiorari, it is stated: "Petitioner first sought the review of federal questions in her Motion for Rehearing to the Supreme Court of Texas."

Plaintiff alleged in her Petition in the trial court that Defendants failed to advise the Decedent and his family that his prognosis was poor; that the proposed radiation treatment was "palliative" only; and if Decedent had been advised of these facts, he allegedly would not have undergone radiation treatment.

The Appendix to the Petition for a Writ of Certiorari contains a copy of the Judgment of the trial court, a copy of the Opinion of the Amarillo Court of Appeals and copies of letters from the Texas Supreme Court advising of the court's denial of the Petition for Review and Motion for Rehearing.

The Appendix to the Petition for a Writ of Certiorari does not contain a copy of Petitioner's Motion for Rehearing in the Texas Supreme Court which would reflect specifically what Federal constitutional question was allegedly asserted by Petitioner in her Motion for Rehearing in the Texas Supreme Court.

Respondent Methodist Hospital's Motion for Summary Judgment and supplement thereto in the trial court was based upon two grounds, which are in essence (1) Defendant Methodist Hospital had no duty or right to discuss with the deceased patient and his family his prognosis and the risks, benefits or other considerations involved and his proposed treatment, as a matter of law; and (2) Plaintiff's claims are governed and barred by the provisions of Vernon's Texas Revised Civil Statutes Annotated, art. 4590i, § 12.01(a), as a matter of law. (1 CR 25, 150).

The other defendants (with the exception of Oncology Hematology Associates) also filed Motions for Summary Judgment. (1 CR 72).

The trial court rendered judgment in favor of all defendants who filed Motions for Summary Judgment and entered an order severing Plaintiff's claims against them from Plaintiff's claims against the remaining defendant, Oncology Hematology Associates. (2 CR 517, 522).

The Court of Appeals for the Seventh District of Texas sitting in Amarillo affirmed the trial court's Judgment. (App. A to the Petition for a Writ of Certiorari in which the Court of Appeals for the Seventh District of Texas is erroneously referred to as the United States Court of Appeals of Texas, Amarillo.)

Petitioner sought review of the Decision of the Amarillo Court of Appeals in the Texas Supreme Court, which denied the Petition for Review and subsequently

the Motion for Rehearing (Pet. App. C and App. D), without opinion.

## SUMMARY OF ARGUMENT

**1. This case and the alleged Federal constitutional contention urged by Petitioner is not before this Court for review.**

Petitioner asserts jurisdiction in this Court under 28 U.S.C.A. § 1257 which provides that a final judgment rendered by the highest court of a state may be reviewed by the Supreme Court by Writ of Certiorari where the validity of a statute of a state is drawn into question on the ground of its being repugnant to the Constitution of the United States.

The record reflects there is no basis for certiorari jurisdiction in this case.

As stated above, this is a suit by Plaintiff against Defendant physician (Dr. Taylor), Defendant Hospital (Methodist Hospital), and others under the theory of common-law fraud and alleged violation of the Texas Deceptive Trade Practices Act.

The trial court rendered judgment for Defendants based on their Motions for Summary Judgment. The Court of Appeals for the Seventh District of Texas at Amarillo affirmed such judgment and subsequently, the Texas Supreme Court refused Plaintiff's Petition for Review (discretionary) and Motion for Rehearing without opinion.

Plaintiff asserted no Federal constitutional contention in the trial court, court of appeals or in her Petition for Review in the Texas Supreme Court. Plaintiff first asserted her constitutional contention in her Motion for Rehearing in the Texas Supreme Court, which was denied without opinion.

Plaintiff's constitutional contention was not timely raised in the State courts, nor was it specifically passed on or decided by the State's highest court (the Texas Supreme Court).

It is also well settled that this Court will not review a state court's decision which is based on independent and adequate state grounds.

The trial court's judgment as to Defendant Methodist and affirmance of that judgment by the court of appeals is supported by the common-law ground (aside from any issue as to the validity or applicability of Vernon's Texas Revised Civil Statutes Annotated, art. 4590i), that Defendant/Respondent Methodist Hospital had no duty or right to advise the deceased patient of his prognosis and the risks or benefits and other considerations involved in his proposed treatment.

Therefore, it is clear that there is no Federal constitutional contention or issue before this Court for review with respect to Defendant/Respondent Methodist Hospital.

**2. Defendant Methodist Hospital had no duty or right to discuss with the deceased patient and his family his prognosis and the risks, benefits and other considerations involved and proposed treatment, as a matter of law.**

It is fundamental that a plaintiff must establish a duty owed by a defendant to the plaintiff upon which the plaintiff's claims are based and that the issue as to whether or not such a duty is owed by the defendant to the plaintiff is a question of law for the court to determine under the facts and circumstances.

A hospital cannot engage in the practice of medicine and a license to practice medicine may be issued only to a natural person.

It is not the function or duty of a hospital to advise a patient of his prognosis or discuss with a patient the risk and benefits of a proposed procedure and this is a non-delegable duty which lies solely with the physician. Defendant Methodist Hospital owed no duty (or right) to advise the deceased patient of his prognosis and that the intent of the proposed radiation treatment was "palliative" only. Therefore, there is no basis for Plaintiff's alleged fraud and DTPA claim against Defendant Methodist, as a matter of law.

**3. Plaintiff's claims are governed and barred by the provisions of Vernon's Texas Revised Civil Statutes Annotated, art. 4590i, § 6.02 and § 12.01(a), which is not unconstitutional.**

Vernon's Texas Revised Civil Statutes Annotated, art. 4590i, § 12.01(a) provides that the provisions of the DTPA

(§§ 17.41-17.63 of the Texas Business and Commerce Code) do not apply to either physicians or health care providers with respect to claims for damages for personal injury or death resulting or alleged to have resulted from the negligence on the part of a physician or health care provider.

Vernon's Texas Revised Civil Statutes Annotated, art. 4590i, § 6.02 provides that in a suit against a physician or health care provider involving a claim based upon the alleged failure to disclose or adequately disclose the risks and hazards involved in the medical care rendered by the physician or health care provider the only theory upon which recovery may be obtained is that of negligence in failing to disclose the risks or hazards that could have influenced a reasonable person in making a decision to give or withhold consent.

In this case, Plaintiff's DTPA claims specifically involve the alleged failure of Defendants to adequately disclose to the Deceased and his family the nature of Deceased's illness and the purpose of the proposed radiation treatment. Plaintiff's claim is clearly a negligence claim under § 6.02 and, therefore, there is no basis for Plaintiff's claim against Defendant Methodist Hospital as a health care provider under the DTPA by virtue of the express provisions of Vernon's Texas Revised Civil Statutes Annotated, art. 4590i, § 12.01(a).

Respondent submits that the provisions of art. 4590i in issue here are clearly constitutional.

Section 6.02 and section 12.01(a) of Vernon's Texas Revised Civil Statutes Annotated, art. 4590i, do nothing

more than eliminate medical malpractice claims based upon negligence from the purview of the Texas DTPA.

Vernon's Texas Revised Civil Statutes Annotated, art. 4590i in no way deprives or even affects a patient's right to refuse medical treatment and in no way restricts a plaintiff's common-law cause of action for fraud (in cases where there is a basis for a common-law cause of action for fraud) in violation of Fourteenth Amendment to the United States Constitution.

## ARGUMENT

**1. This case and the alleged Federal constitutional contention urged by Petitioner are not before this Court for review.**

28 U.S.C. § 1257 providing a basis for certiorari review by this Court of a state court decision provides that final judgments rendered by the highest court of a state may be reviewed by the Supreme Court by certiorari where the validity of a state statute is drawn in question on the ground of its being repugnant to the Constitution of the United States.

The law governing presentation of the alleged Federal constitutional issue in the state courts is well-summarized in 36 C.J.S. Federal Courts § 274(2). It is there stated (pp. 749-50):

> *Presenting question in trial court.* The reviewing power of the Supreme Court of the United States is confined to the judgments and decrees of the highest state court in which a decision could be had, see supra § 239, and in the great

> majority of cases the decision which was brought up for review is one rendered on appeal from, or writ of error to, a lower court of the state. *Consequently, as it is a rule of almost universal application that questions not raised in the trial court will not be considered on appeal, one who desires to save his right of review by the United States Supreme Court must raise the federal question on which he relies in the trial court. One who, on appeal or writ of error to a state court, raises a federal question not set up in the trial court, cannot ask a review by the Supreme Court of the United States in case the state appellate court declines or omits to consider such question.* (Footnote omitted.) (Emphasis added.)

(p. 750):

> *Question raised on petition for rehearing. It is not sufficient to raise the federal question for the first time in a petition for rehearing after judgment has been rendered by the state court, unless the court entertains the motion and decides the question or unless the first opportunity to present the question was on the motion for the rehearing.* In other words, questions first presented to the highest state court on a petition for rehearing come too late for consideration by the United States Supreme Court on certiorari unless the state court exerted its jurisdiction in such a way that the case could have been taken to the United States Supreme Court if the questions had been raised prior to the original disposition. (Footnotes omitted.) (Emphasis added.)

In *Clark v. Jeter*, 486 U.S. 456, 100 L. Ed. 2d 465, 108 S. Ct. 1910 (1988), this Court said:

> Having reviewed the record, however, we find that Clark did not adequately present a federal pre-emption argument to the lower courts. It is our practice, when reviewing decisions by state courts, not to decide federal claims that were not "pressed or passed upon" below. Bankers Life & Casualty Co. v. Crenshaw, 486 US 71, 79-80, 100 L Ed 2d 62, 108 S Ct 1656 (1988).

486 U.S. at 459-60.

In *Adams v. Robertson*, 520 U.S. 83, 137 L. Ed. 2d 203, 117 S. Ct. 1028 (1997), this Court said:

> With "very rare exceptions," *Yee* v *Escondido*, 503 US 519, 533, 118 L Ed 2d 153, 112 S Ct 1522 (1992), we have adhered to the rule in reviewing state-court judgments under 28 USC § 1257 [28 USCS § 1257] that we will not consider a petitioner's federal claim unless it was either addressed by or properly presented to the state court that rendered the decision we have been asked to review. See *Heath* v *Alabama*, 474 US 82, 87, 88 L Ed 2d 387, 106 S Ct 433 (1985); *Illinois* v *Gates*, 462 US 213, 217-219, 76 L Ed 2d 527, 103 S Ct 2317 (1873); *McGoldrick* v *Compagnie Generale Transatlantique*, 309 US 430, 4343, 84 L Ed 849, 60 S Ct 670 (1940). As petitioners concede here, the Alabama Supreme Court did not expressly address the question on which we granted certiorari. See Reply Brief for Petitioners 2-3, n. 1.
>
> **[1b, 2]** Nor have petitioners met their burden of showing that the issue was properly presented to the court. *When the highest state court is silent on a federal question before us, we assume that the issue was not properly presented. Board of Directors of Rotary Int'l* v *Rotary Club of Duarte*, 481 US

> 537, 550, 95 L Ed 2d 474, 107 S Ct 1940 (1987), * * * . (Emphasis added.)

520 U.S. at 86-87.

In *Bd. of Dirs. of Rotary Int'l v. Rotary Club*, 481 U.S. 537, 95 L. Ed. 2d 474, 107 S. Ct. 1940 (1987), this Court said:

> It is well settled that this Court will not review a final judgment of a state court unless "the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system." Webb v Webb, 451 US 493, 496-497, 68 L Ed 2d 392, 101 S Ct 1889 (1981). *Appellants did not present the issues squarely to the state courts until they filed their petition for rehearing with the Court of Appeal. The court denied the petition without opinion. When " ' "the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary." ' "* Exxon Corp. v Eagerton, 462 US 176, 181, n 3, 76 L Ed 2d 497, 103 S Ct 2296 (1983) (quoting Fuller v Oregon, 417 US 40, 50, n 11, 40 L Ed 2d 642, 94 S Ct 2116 (1974) (quoting Street v New York, 394 US 576, 582, 22 L Ed 2d 572, 89 S Ct 1354 (1969))), Appellants have made no such showing in this case. (Emphasis added.)

481 U.S. at 550.

In the case at bar, Petitioner did not raise a purported Federal or constitutional question until filing her Motion for Rehearing in the Texas Supreme Court after the denial by the Texas Supreme Court of the Petition for Review from the decision of the Amarillo Court of Appeals.

The issue was not properly presented to or expressly decided by the State courts.

Furthermore, it is well settled that when a state court decision is based upon state law that is both adequate and independent (of any Federal issue), this Court will not review that decision.

In *Mullaney v. Wilbur*, 421 U.S. 684, 44 L. Ed. 2d 508, 95 S. Ct. 1861 (1975), this Court said:

> "This Court, however, repeatedly has held that state courts are the ultimate expositors of state law, see, e.g., Murdock v City of Memphis, 20 Wall 590, 22 L Ed 429 (1875); Winters v New York, 333 US 507, 92 L Ed 840, 68 S Ct 665 (1948), and that we are bound by their constructions except in extreme circumstances not present here." (Footnote omitted.) 421 U.S. at 691.

*See also Coleman v. Thompson*, 501 U.S. 722, 115 L. Ed. 2d 640, 111 S. Ct. 2546 (1991), *reh'g denied*, 501 U.S. 1227 (1997); *Calderon v. U.S. Dist. Ct. for E. D. Cal.*, 96 F.3d 1126, 1129 (9th Cir. 1996), *cert. denied*, 520 U.S. 1204 (1997); *Schad v. Arizona*, 501 U.S. 624, 115 L. Ed. 2d 555, 111 S. Ct. 2491 (1991), *reh'g denied*, 501 U.S. 1277 (1991).

In *Illinois v. Rodriguez*, 497 U.S. 177, 111 L. Ed. 2d 148, 110 S. Ct. 2793 (1990), this Court said: "When a state-court decision is clearly based on state law that is both adequate and independent, we will not review the decision. Michigan v Long, 463 US 1032, 1041, 77 L Ed 2d 1201, 103 S Ct 3469 (1983)." 497 U.S. at 182.

In *Lambrix v. Singletary*, 520 U.S. 518, 137 L. Ed. 2d 771, 117 S. Ct. 1517 (1997), this Court said:

> In *Coleman* v *Thompson*, 501 US 722, 729, 115 L Ed 2d 640, 111 S Ct 2546 (1991), we reaffirmed that this Court "will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment." See also *Harris* v. *Reed*, 489 US 255, 262, 103 L Ed 2d 308, 109 S Ct 1038 (1989). We in fact lack jurisdiction to review such independently supported judgments on direct appeal: Since the state-law determination is sufficient to sustain the decree, any opinion of this Court on the federal question would be purely advisory. *Herb* v *Pitcairn*, 324 US 117, 125-126, 89 L Ed 789, 65 S Ct 459 (1945); see also *Sochor* v. *Florida*, 504 US 527, 533-534, and n., 119 L Ed 2d 326, 112 S Ct 2114 (1992).

520 U.S. at 522-3.

In the case at bar, the decision of the trial court and the decision of the court of appeals with respect to Defendant Methodist Hospital were based first and foremost upon State law, which is clearly adequate and independent of the Texas statutory provision which Petitioner here asserts is unconstitutional.

**2. Defendant Methodist Hospital had no duty (or right) to discuss with the Deceased and his family the Deceased's prognosis and the risks, benefits, and other considerations involved in proposed treatment, as a matter of law.**

It is fundamental that under any alleged cause of action or theory of recovery, a plaintiff must establish a duty owed by a defendant to the plaintiff upon which the

plaintiff's claims are based and that the issue as to whether or not such a duty is owed by the defendant to the plaintiff is a question of law for the court to determine under the particular facts of the case. *Golden Spread Council, Inc. v. Akins*, 926 S.W.2d 287 (2) (Tex. 1996); *Bird v. W.C.W.*, 868 S.W.2d 767 (2) (Tex. 1994); *Greater Houston Transp. Co. v. Phillips*, 801 S.W.2d 823 (4) (Tex. 1990).

In this case, it is undisputed that Defendant Methodist Hospital owed no duty to discuss with the Deceased, Billy Dewayne Johnson, or the Deceased's family, his prognosis and the risks, benefits, or other considerations involved in radiation therapy or other treatment options and, in fact, could not have legally done so.

In addition to the cases discussed below, the first ground of Methodist Hospital's Motion for Summary Judgment (that it had no duty (or right) to discuss with the patient and his family his prognosis and the risks, benefits or other considerations involved in the proposed treatment) is supported by the deposition testimony of Dr. Lytle, one of the originally named defendants to this suit.

Subsequent to the filing of the suit, Plaintiff filed a Notice of Nonsuit with respect to Dr. Lytle. (1 CR 15).

Methodist Hospital's Motion for Summary Judgment and first supplement thereto are based in part upon relevant portions of the deposition testimony of Dr. Lytle, Dr. Grant Taylor, Dana Rains, and Kathy Lambright, which are attached as exhibits to Methodist Hospital's Motion and First Supplement to Motion for Summary Judgment.

Dr. Lytle testified that he was board certified in radiation oncology. (1 CR 37).

Dr. Lytle testified that the Deceased was referred to him by Dr. Taylor for radiation therapy.

Dr. Lytle testified that he had a contract with Hodges Cancer Center to provide medical services to their patients. He was not an employee of Methodist Hospital but was an independent contractor physician. He billed his patients directly for his services which charges were not shared with Methodist Hospital. (1 CR 55-56).

He testified that when he receives referrals from other physicians such as Dr. Taylor, he makes an independent judgment and determination as to whether radiation therapy should be recommended to the patient. (1 CR 38-39).

Dr. Lytle testified that he was of the opinion that radiation therapy would be beneficial to the Deceased and should be undertaken for the reasons discussed in the deposition. (1 CR 39-40).

Dr. Lytle testified that he did discuss Mr. Johnson's prognosis with him and his family. (1 CR 42).

Dr. Lytle testified that the decision as to whether or not to undertake the radiation treatment was a decision made by himself and the patient. (1 CR 54, 59).

Dr. Lytle further testified that although he had no independent recollection of his specific discussions and explanations of proposed treatment with the Deceased in this case, this was his customary practice, and the records including the signed consent of the Deceased indicates

that he did discuss these matters with the Deceased. (1 CR 45-46, 60).

Dr. Lytle further testified unequivocally that it is not the role of the staff at Hodges Cancer Center to discuss with a patient their prognosis, and the role of the staff at Hodges Cancer Center is to carry out the orders which he gives them in connection with treatment.

In this connection, Dr. Lytle testified specifically as follows:

"Q All right, sir. Would you expect the role of the staff there at the Hodges cancer center to discuss with a patient their prognosis?

"A No.

"Q What is the role of the staff there?

"A The role of the staff is primarily to carry out the orders that I give them.

* * *

"Q Is it the role of the staff at the Hodges Cancer Center to carry out your orders, doctor?

"A Yes." (1 CR 61).

Dr. Taylor testified in this regard as follows:

"Q Okay. And did you – when you referred a patient over to Methodist Hodges Cancer Center for radiation therapy, did you expect Dr. Lytle or any of the staff over there to go into any detail about the patient's prognosis?

"A Generally not. Generally we figured as the medical people involved, especially with

> metastatic disease, that we were the ones who knew best about that; no." (1 CR 187).

Dana Rains was the administrative director of Hodges Cancer Center during the time that the Deceased, Billy Johnson, was treated at Hodges (1 CR 192-193) and Kathy Lambright was an L.V.N. who worked in radiation at Hodges during the period in time, including the period of Mr. Johnson's treatment. (1 CR 206-207).

Dana Rains testified that the staff personnel at Hodges were not licensed to practice medicine and both Ms. Rains and Ms. Lambright testified that the staff at Hodges Cancer Center did not discuss with the patients their prognosis, the various treatment options available, the purpose of the treatment prescribed or any other considerations involved in the treatment and their function was simply to administer or assist in administering the treatment prescribed by the physician.

Both Ms. Rains and Ms. Lambright confirmed that any consultation with regard to diagnosis and other considerations involved in the treatment options and treatment being administered is between the physician and the patient and his family and the staff is not privy to those discussions between the physician and the patient and the patient's family. (1 CR 195, 197, 200, 210, 211).

Defendant Methodist Hospital, d/b/a Hodges Cancer Center is not licensed to practice medicine under Vernon's Texas Revised Civil Statutes Annotated, art. 4495b, the Texas Medical Practice Act, and does not purport to practice medicine.

It is well settled that a corporation cannot engage in the practice of medicine. A license to practice medicine

may be issued only to a natural person. *Woodson v. Scott & White Hospital*, 186 S.W.2d 720, 724-725 (3, 4) (Tex. Civ. App. – Austin 1945, writ ref'd w.m.); *Williams v. Good Health Plus, Inc.*, 743 S.W.2d 373 (1) (Tex. App. – San Antonio 1987, no writ); *Flynn Bros., Inc. v. First Medical Associates*, 715 S.W.2d 782, 785 (Tex. App. – Dallas 1986, writ ref'd n.r.e.).

The practice of medicine by one who is not registered and licensed to practice medicine is prohibited by law. *Kirk v. Standard Life and Accident Ins. Co.*, 475 S.W.2d 570, 573(3) (Tex. 1972).

Diagnosis of medical conditions constitutes the practice of medicine and is authorized only by a licensed physician. *Webber v. State*, 370 S.W.2d 889(1) (Tex. Crim. App. 1963); *Kelley v. Texas State Board of Medical Examiners*, 467 S.W.2d 539(4) (Tex. Civ. App. – Fort Worth 1971, writ ref'd n.r.e.), *cert. denied*, 405 U.S. 1073, *reh'g denied*, 407 U.S. 916 (1972).

In this connection, there are numerous cases holding that it is the function and duty of the physician to discuss with the patient his prognosis and the factors involving the possible benefits, risks, and other consideration in the connection with the proposed treatment and treatment options in order for the patient to make an informed judgment. This is a non-delegable duty and the duty to discuss these options and obtain the patient's informed consent rests solely with the treating physician. Numerous cases hold that the physician is under a duty to make reasonable disclosure of the diagnosis and the risks of proposed treatment with the patient. *Wilson v. Scott*, 412 S.W.2d 299, 301 (Tex. 1967); *Anderson v. Hooker*,

420 S.W.2d 235, 237-238 (Tex. Civ. App. – El Paso 1967, writ ref'd n.r.e.); *Karp v. Cooley*, 493 F.2d 408, 419 (5th Cir. 1974) appeal from Southern District of Texas, *rehearing den'd*, 496 F.2d 878 (5th Cir. 1974), *cert. den'd*, 419 U.S. 485 (1975).

*See also Jacobs v. Thimer*, 519 S.W.2d 846, 848(3) (Tex. 1975); *Powers v. Floyd*, 904 S.W.2d 713, 717(6) (Tex. App. – Waco 1995, writ den'd), *cert. den'd*, 516 U.S. 1126 (1996); *Galvan v. Downey*, 933 S.W.2d 316, 318(2) (Tex. App. – Houston [14th Dist.] 1996, writ den'd); *Winkle v. Tullos*, 917 S.W.2d 304(22) (Tex. App. – Houston [14th Dist.] 1995, writ den'd); *Johnston v. Vilardi*, 817 S.W.2d 794, 796(3) (Tex. App. – Houston [1st Dist.] 1991, writ den'd); *Johnson v. Whitehurst*, 652 S.W.2d 441, 444(2) (Tex. App. – Houston [1st Dist.] 1983, writ ref'd n.r.e.); *Winkle v. Tullos*, 917 S.W.2d 304, 313(22) (Tex. App. – Houston [14th Dist.] 1995, writ den'd); *Hood v. Phillips*, 357 S.W.2d 291, 294(4) (Tex. Civ. App. – Beaumont 1976), *aff'd*, 554 S.W.2d 160 (Tex. 1977).

In this regard, there are a number of cases specifically holding that it is not the function or duty of the hospital to discuss with the patient his diagnosis and the risks and benefits of the proposed procedure and such duty lies with the physician.

In *Gibson v. Methodist Hosp.*, 822 S.W.2d 95 (16) (Tex. App. – Houston [1st Dist.] 1991, rev'd, op. withdrawn, den'd), the court said:

> *It is not the function of a hospital to discuss with a patient risks and benefits of a procedure; this duty lies with the physician.* See *Ritter v. Delaney*, 790 S.W.2d 29, 31 (Tex.App. – San Antonio 1990, writ

> denied); *Nevauex v. Park Place Hosp., Inc.*, 656 S.W.2d 923, 925 (Tex.App. – Beaumont 1983, writ ref'd n.r.e.) (*The duty to obtain informed consent in Texas is that of the physician*); *Weiser v. Hampton*, 445 S.W.2d 224, 231 (Tex.Civ.App. – Houston [1st Dist.] 1969, writ ref'd n.r.e.) Thus, *Methodist did not have a duty to obtain informed consent from Gibson.* (Emphasis added.)

*Gibson*, 822 S.W.2d at 101.

In *Boney v. Mother Frances Hosp.*, 880 S.W.2d 140 (Tex. App. – Tyler 1994, writ denied), the court said:

> As to the first two points of error informed consent causes of action against health care providers are governed by the Texas Medical Liability and Insurance Improvement Act. TEX.REV.CIV.STAT.ANN." art. 4590i (Vernon Supp.1989). They are negligence actions. *McKinley v. Stripling*, 763 S.W.2d 407, 409 (Tex.1989). *Thus, for the plaintiff to prevail, there must be a duty by the Hospital to disclose medical risks and possible complications that could arise from the surgery as well as secure written informed consent to the surgical procedure from the patient.*
>
> *In Texas, this duty is imposed solely upon the treating doctor; it is his non-delegable duty. The hospital has no such duty of disclosure of medical or surgical risks, nor is it required to secure a patient's informed consent prior to surgery. Gibson v. Methodist Hospital*, 822 S.W.2d 95 (Tex.App. – Houston [1st Dist.] 1991, writ denied); *Ritter v. Delaney*, 790 S.W.2d 29, 31 (Tex.App. – San Antonio 1990, writ denied); *Nevauex v. Park Place Hospital, Inc.*, 656 S.W.2d 923, 925 (Tex.App. – Beaumont 1983, writ ref'd n.r.e.); *see Urgan v. Spohn*, 869 S.W.2d 450, 452 (Tex.App. – Corpus Christi 1993, writ

> denied). *Boney*, 880 S.W.2d at 142-143. (Emphasis added.)

In *Ritter v. Delaney*, 790 S.W.2d 29 (Tex. App. – San Antonio 1990, writ den'd), the court said (p. 31):

> Here, as in *Nevauex*, which considered § 6.02 of the Act in its decision, we recognize that it is the duty of the treating physician, and not the hospital, to secure the informed consent of the patient. *See Nevauex v. Park Place Hosp.*, 656 S.W.2d 923, 925 (Tex.App. – Beaumont 1983, writ ref'd n.r.e.); *Johnson v. Whitehurst*, 652 S.W.2d 441, 445 (Tex.App. – Houston [1st Dist.] 1983, writ ref'd n.r.e.); *Forney v. Memorial Hosp.*, 543 S.W.2d 705, 707 (Tex.Civ.App. – Beaumont 1976, writ ref'd n.r.e.); *Ross v. Sher*, 483 S.W.2d 297, 301 (Tex.Civ.App. – Houston [14th Dist.] 1972 writ ref'd n.r.e.); *Weiser v. Hampton*, 445 S.W.2d 224, 231 (Tex.Civ.App. – Houston [1st Dist.] 1969, writ ref'd n.r.e.) (emphasis added).

*See also Nevauex v. Park Place Hosp., Inc.*, 656 S.W.2d 923, 925 (Tex. App. – Beaumont 1993, writ refused n.r.e.); *Johnson v. Whitehurst*, 652 S.W.2d 441, 444 (Tex. App. – Houston [1st Dist.] 1983, writ refused n.r.e.).

**3. Plaintiff's claims are also governed and barred by the provisions of § 6.02 and § 12.01(a) of Vernon's Texas Revised Civil Statutes Annotated, art. 4590i and such statute is not unconstitutional.**

A hospital is among the persons and entities specifically listed in the definition of a "Health care provider" in § 1.03(a)(3) of Vernon's Texas Revised Civil Statutes Annotated, art. 4590i.

§ 1.03(a)(4) provides:

(4) Health Care Liability claim means a cause of action against a health care provider of physician for treatment, lack of treatment, or other claimed departure from accepted standards of medical care or health care, or safety which proximately results in injury to or death of the patient, whether the patient's claim or cause of action sounds in tort or contract.

§ 6.02 provides:

*In a suit against a physician or health care provider involving a health care liability claim that is based on the failure of the physician or health care provider to disclose or adequately to disclose the risks and hazards involved in the medical care or surgical procedure rendered by the physician or health care provider, the only theory on which recovery may be obtained is that of negligence in failing to disclose the risks or hazards that could have influenced a reasonable person in making a decision to give or withhold consent.* (Emphasis added.)

§ 12.01(a) provides:

*Notwithstanding any other law, no provisions of Sections 17.41-17.63, Business & Commerce Code, shall apply to physicians or health care providers as defined in Section 1.03(3) of this Act, with respect to claims for damages for personal injury or death resulting, or alleged to have resulted, from negligence on the part of any physician or health care provider.* (Emphasis added.)

It is well settled by a number of Texas Supreme Court and other Texas Appellate Court decisions that regardless of how Plaintiff's claims are worded or attempted to be cast by Plaintiff in his pleadings, that a claim under the

DTPA against a physician or other health care provider which is grounded upon alleged negligence (as distinguished from a claim based upon express warranty) is barred under the provisions of Vernon's Texas Revised Civil Statutes Annotated, art. 4590i, § 12.01(a).

Among numerous cases so holding are *MacGregor Medical Ass'n v. Campbell*, 985 S.W.2d 38, 39-40 (Tex. 1998); *Sorokolit v. Rhodes*, 889 S.W.2d 239, 242 (Tex. 1994); *Walden v. Jeffrey*, 907 S.W.2d 446(1) (Tex. 1995); *Gormley v. Stover*, 907 S.W.2d 448, 450 (Tex. 1995); *Mulligan v. Beverly-Enterprises Texas*, 954 S.W.2d 881, 883-884 (Tex. App. – Houston [14th Dist.] 1997, no writ); *Tajchman v. Giller*, 938 S.W.2d 95, 100-101 (Tex. App. – Dallas 1996, writ denied); *Wright v. Fowler*, 991 S.W.2d 343, 352 (Tex. App. – Fort Worth 1999, no writ to date); *Hall v. Dow Corning Corp.*, 114 F.3d 73, 78 (5th Cir. 1997) appealed from Southern District of Texas.

In the case at bar, there can be no contention that Plaintiff's claims against Defendants, including Defendant Methodist Hospital, are based upon express warranty as distinguished from negligence.

Quite to the contrary, Plaintiff's alleged claim against Defendants in this case basically is the assertion that the Deceased and his family were never advised by Defendants of the Deceased's alleged poor prognosis and that the treatment intent was "palliative" only. Clearly this is not a claim based upon an express warranty but a claim based upon alleged failure to conform to the accepted and required standard of care by Defendants, which is a claim based upon negligence.

As noted above, Vernon's Texas Revised Civil Statutes Annotated, art. 4590i, § 6.02 specifically provides that where the suit against a physician or health care provider involving a health care liability claim is based upon the failure of the physician or health care provider to disclose or adequately disclose the risks or hazards involved in the medical care rendered by the physician or health care provider "**** the only theory on which recovery may be obtained is that of negligence in failing to disclose the risks or hazards that could have influenced a reasonable person in making a decision to give or withhold consent."

This is precisely the contention of the Plaintiff in the case at bar and § 12.01(a) of article 4590i specifically provides that no provisions of the DTPA (namely §§ 17.41-17.63 of the Texas Business and Commerce Code) shall apply with respect to claims for damages for personal injury or death resulting or alleged to have resulted from the negligence on the part of any physician or health care provider.

Thus, Plaintiff's alleged claim against Defendant Methodist and the other defendants are clearly barred and precluded by the provisions of Vernon's Texas Revised Civil Statutes Annotated, art. 4590i, as a matter of law.

Respondent submits that the provisions of art. 4590i in issue here are clearly constitutional. Section 6.02 and section 12.01(a) of Vernon's Texas Revised Civil Statutes Annotated, art. 4590i, do nothing more than eliminate medical malpractice claims based upon negligence from the purview of the Texas DTPA.

Vernon's Texas Revised Civil Statutes Annotated, art. 4590i in no way deprives or even affects a patient's right to refuse medical treatment and in no way restricts a plaintiff's common-law cause of action for fraud (in cases where there is a basis for a common-law cause of action for fraud) in violation of Fourteenth Amendment to the United States Constitution.

## CONCLUSION AND PRAYER

No Federal issue was timely raised or decided by the Texas courts. This case presents no Federal constitutional or other Federal issue with respect to Respondent Methodist Hospital. The Texas court's decision with respect to Respondent Methodist Hospital is based first and primarily upon state law and was correctly decided. The Petition for a Writ of Certiorari should be denied.

WHEREFORE, PREMISES CONSIDERED, Respondent Methodist Hospital, d/b/a Hodges Cancer Center, prays that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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